Supreme Court, U.S.
FILED
AUG 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-109

In The
# Supreme Court of the United States
October Term, 1987

BILL ROSS CREAMER,

*Petitioner,*

v.

MICHAEL S. RAFFETY, *et al.*,

*Respondents.*

**Petition For Writ of Certiorari to the Court of Appeals of the State of Arizona**

## REPLY AND OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS RUSSELL CLARK
MESCH, CLARK & ROTHSCHILD, P.C.
259 North Meyer Avenue
Tucson, Arizona 85701-1090
(602) 624-8886

*Attorney of Record for Respondents Raffety and Morris*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

## QUESTION PRESENTED FOR REVIEW

Whether the lower court, after holding two days of hearings and hearing evidence, abused its discretion in awarding Plaintiff $15,000.00 in attorney fees and $4,007.26 in costs.

## PARTIES TO THE PROCEEDINGS

Petitioner, who was plaintiff below, is Bill Ross Creamer.

Respondents, who were defendants below, are Michael S. Raffety, Jean Raffety, Huey Lee Morris, Ruth Ann Morris, and City of Willcox.

TABLE OF CONTENTS

Page

Statement of the Case ..... 1

Reasons for Denying the Writ ..... 4

The Lower Court Held Extensive Hearings On A Hotly Contested Request For Attorney Fees. The Lower Court Properly Considered All Of The Factors Required By Law And Awarded A Substantial Amount Of Attorney Fees And Costs To Petitioner. There Are No Special And Important Reasons For Granting The Writ. There Was No Abuse Of Discretion By The Trial Court ..... 4

Conclusion ..... 10

Appendix ..... 1a

## TABLE OF AUTHORITIES

### Cases


| | Pages |
|---|---|
| City of Riverside v. Rivera, — U.S. —, 106 Sup. Ct. Rptr. 2686 (1986) | 6 |
| Copeland v. Marshall, 641 F.2d 880 (1980) | 9 |
| Hensley v. Eckerhart, 461 U.S. 424 (1983) | 5, 7, 8, 9 |
| Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974) | 1, 6 |
| Rutherford v. Pitchess, 713 F.2d 1416 (9th Cir. 1983) | 6 |
| Sargeant v. Sharp, 579 F.2d 645 (1st Cir. 1978) | 7, 8 |

## STATEMENT OF THE CASE

The Petitioner has omitted several important facts and has inaccurately suggested to the court that Petitioner below justified the full fee requested by way of affidavits and depositions.

This was a hotly contested matter, to say the least. Two full days of hearings were held on the 9th of December, 1985 and on the 24th of December, 1985. Transcripts of those proceedings were available to the appellate courts and they exceed 160 pages of testimony.

The lower court judge allowed a full evidentiary hearing and allowed the Petitioner's counsel to be heard. Petitioners did not choose to bring any experts of their own to testify in favor of the award and supplied the court with a proposed form of judgment that was silent as to the various factors the court considered in arriving at its final determination.

The trial court indicated that it was going to weigh all of the evidence it had heard and use the twelve factors cited in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) and come up with a just decision in awarding Plaintiff's attorney's fees.

The trial court in awarding the $15,000.00 for attorney fees specifically held that it had considered the following:

1. The court's presiding over the initial trial of the matter.

2. The courts having considered the decision of the Court of Appeals.

3. The court having reviewed the file.

4. The court having reviewed the motions and memorandums.

5. The court having reviewed the deposition of Mr. Behrens (Petitioner's counsel).

6. The court having reviewed the deposition of Mr. McDonald (Respondents' expert).

7. The court having heard testimony (Mr. Lundquist, another Respondents' expert) before the court in support and in opposition to the motion for fees.

8. The court having considered the twelve factors set forth in the proposed form of judgment.

It is abundantly clear the lower court had more than adequate evidence before it contesting the Petitioner's request for attorney fees. The lower court obviously recognized the many factors that it needed to consider in awarding the fees and took time out in a busy superior court trial schedule to hold two full days of hearings on the matter.

There was no request for a finding of fact or conclusions of law ever made pursuant to the appropriate rules of Arizona Civil Procedure.

At the close of the hearings hotly contesting the fees, the court stated to counsel as follows:

> "I am going to weigh all this information and the twelve factors cited in the cases to come up with a just decision which will award something to Plaintiff. I don't expect it will be $80,000.00, but it will be something." Reporter's transcirpt, December 24, 1984, page 88.

This case was settled for a nuisance value of $5,250.00 filed in the form of an Offer to Confess Judgment so that the defense would not have to undergo further trial, attorney fees, and costs. Plaintiff then filed an Affidavit for Attorney Fees requesting approximately $80,000.00. The injuries to the Plaintiff were minor, he had some handcuff red rings around his wrists, and complained of emotional upset which he was basically over. He spent four to five hours one night in jail and his damages, if any, were minimal. Petitioners omit some of the facts which the lower court, in its discretion, heard in determining the amount of the fee award. Some of those additional facts are as follows:

1. The trial court, in holding two days of hearings, heard the testimony of two experienced lawyers in the handling of civil rights litigation. They were Mr. Lundquist and Mr. McDonald.

2. Both Mr. Lundquist and Mr. McDonald reviewed the entire matter and formed an opinion as to what would be a reasonable amount for attorney fees. Mr. Lundquist said $11,000.00 to $15,000.00 was reasonable and Mr. McDonald said $7,500.00 to $10,000.00 was reasonable.

3. Mr. Behrens, Petitioner's counsel, had never tried a civil rights litigation and had very little, if any, experience in court handling jury trials.

4. Petitioner's counsel asked to be reimbursed for travelling to and from a police misconduct seminar (over eleven hours) and totally inappropriate matters which were unusual and unnecessary in accordance with the expert testimony. Petitioner also hired a legal assistant who had

no prior experience to sit through the trial and charged for her hourly rate.

5. The trial court sent its supplemental Order to the appellate court on November 20, 1986 clarifying its award of attorney's fees and costs, 2a.

---

## REASONS FOR DENYING THE WRIT

**The Lower Court Held Extensive Hearings On A Hotly Contested Request For Attorney Fees The Lower Court Properly Considered All Of The Factors Required By Law And Awarded A Substantial Amount Of Attorney Fees And Costs To Petitioner. There Are No Special And Important Reasons For Granting The Writ. There Was No Abuse Of Discretion By The Trial Court.**

The Petitioner's position seems to be that the court must discuss specifically each of the factors and give a detailed account of how it arrived at an amount that is less than the Petitioner's Affidavit. This is simply not the law and has never been the law in the United States or any court thereof.

There is no contention that the lower court in this matter failed to consider a necessary element in the award of attorney fees. The record clearly shows that the lower court did in fact consider all of the appropriate factors.

A party seeking an award for attorney fees has the burden of establishing "by clear and convincing evidence" that the time and effort claimed and expended was neces-

sary to achieve the results obtained. See *Hensley,* 103 S.Ct. at page 1943 (Berger, C.J. concurring).

Trial courts are busy enough throughout the United States. They should not be required to quantify each factor in order to show how they arrived at a specific amount of an award. As the Arizona decision indicates, this would be a waste of judicial time and in many cases nearly impossible. The record should, however, reflect that there was sufficient evidence under the applicable law to support the court's determination and that the court *considered* the necessary factors.

The *Hensley* decision likewise does not require a lower court to specifically identify the hours that it eliminated. This Court stated in *Hensley* as follows at 103 S.Ct. page 1941:

> "The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success."

Therefore, it is clear that the lower court in our case did not need to specifically identify and discuss in detail the various factors, but it is only necessary that the court and record show that it both considered those factors and that there was adequate evidence to support a reduction. There has never been an allegation in this matter that the lower court did not have sufficient evidence to support a reduction or that the court failed to consider a factor it should have.

The lower court does not have to come up with any precise formula and in fact, the trial court can use a common sense approach and weigh the hours claimed against

its own knowledge, experience and expertise of the time required to complete similar activities. *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974) at page 717.

In *Rutherford v. Pitchess,* 713 F.2d 1416 (9th Cir. 1983) the court held that a lower court does not have to discuss specifically all of the reasonings and each of the factors and itemize the particular amount. The court held that it was adequate if the lower court explains that it considered the factors in reaching its determination, but that there is no necessity to itemize the specific reasoning concerning those factors. In *Rutherford,* the 9th Circuit said at 713 F.2d page 1420 the following:

> "The district court . . . need not discuss specifically each of the twelve factors. It is sufficient if the record shows that the court *considered* the factors 'called into question by the case at hand and necessary to support reasonableness of the fee award'." (Emphasis added)

The Petitioner suggests the record in this case shows the lower court may have based its attorney fees on the theory of proportionality, an approach which was rejected by *City of Riverside v. Rivera,* 106 S.Ct. 2686 (1986). In the first place, the Respondents never argued proportionality and certainly if you have a $5,000.00 case with $15,000.00 to $20,000.00 in attorney fees and costs the record does not support a proportionality argument. The issue, as the court knows, in *City of Riverside v. Rivera, supra,* was whether or not an award of attorney fees is per se "unreasonable" if it exceeds the amount of damages recovered by the Plaintiff in the underlying civil rights action. In our case the Plaintiff's attorney was awarded attorney fees *three times the amount of damages*

*recovered by the Plaintiff.* Even though this case did have a contingency fee agreement in it (33 1/3 percent of the amount collected) the trial court obviously did not take the proportionality view. If it had, it could have awarded fees in an amount smaller than the $5,250.00 obtained by the Petitioner but the court did not choose to do so.

Based upon the record in this case there is no showing that the lower court's ruling was clearly erroneous. The lower court applied the factors announced in *Hensley* in calculating the fee award and the court did not abuse its discretion in awarding attorney fees, even though it awarded fees and costs in approximately four times the amount of the compensatory amount.

There is no question that the court demonstrated that it had considered the evidence in light of the appropriate standards and applied them in making its award in this matter. The court had before it the testimony of two qualified individuals who had many years of experience in handling these cases as opposed to the Petitioner's counsel who not only had no experience in civil rights litigation, had very little, if any, experience in trial matters. Petitioner cites the case of *Sargeant v. Sharp,* 579 F.2d 645 (1978) as support for their position. This case, like many of the cases cited, is not in point and the *Sargeant* decision is a case where the court remanded the case for an evidentiary hearing. In our case we had an evidentiary hearing on the issues of entitlement to the fees and the amount. Additionally, the *Sargeant* decision is a case where the lower court judge decided that since there was a contingency fee agreement and that since the attorney had al-

ready been paid something, that he was not entitled to any additional fees. In our case the lower court decided, obviously, that the Petitioner's counsel was entitled to three times the amount of the compensatory damages in awarding its reasonable attorney fees. Additionally, in *Sargeant* the court indicated at 579 F.2d at page 647 as follows:

> "The record does not support a finding that the court gave adequate consideration to either of the grounds forwarded as a possible basis for the award of fees."

Our record certainly supports the fact that the court gave adequate consideration and as a matter of fact held a hearing that lasted for two days with expert testimony, both for and against the amount of fees. In our case the transcript of the proceedings is replete with evidence of qualified experts in the area who testified the Petitioner's requested fees were not reasonable and the testimony further supports what a reasonable amount of fees should be for a case of this nature. None of the cases cited by the Petitioner are similar to the fact situation of our matter.

*Hensley* requires the fee applicant to exercise billing judgment because the hours he may seek compensation for must be reasonable. There is no question the lower court in this case had before it ample evidence that the billing judgment was not reasonable and that the hours spent were not reasonably expended on the litigation. There is no evidence whatsoever that the lower court abused its discretion and erroneously awarded three to four times more than the compensatory damages in both attorney fees and court costs.

Counsel for the Petitioner did not make a good faith effort to exclude from the fee request hours that were excessive and unnecessary. This was testified to by the experts at the two-day hearing and is well documented in the transcripts and depositions of both Mr. Lundquist and Mr. McDonald. Hours that are not properly billed to one's client are also not properly billed to one's adversary just because there is some statutory authority for them. *Copeland v. Marshall,* 641 F.2d 880 (1980).

In the case that we are dealing with there was a simple arrest, the defendant was strip searched and kept in jail for four to five hours. This is not a complex civil rights litigation involving numerous challenges to institutional practices or conditions. Certainly the facts of our particular case are also a far cry from the situation referred to in *Hensley,* 461 U.S. at 436.

The amount of attorney fees to be awarded in civil rights litigation is within the sound discretion of the trial court. The trial court in this case not only used its discretion in awarding fees to the Petitioner, but it also held two evidentiary hearings entitling the Petitioner to support his position. There was adequate evidence before the trial court that Petitioner's claim for attorney fees were excessive and unnecessary. The record supports the fact that the court considered the necessary and appropriate factors in rendering its decision.

———o———

## CONCLUSION

For all of the above reasons it is respectfully requested this Court deny the issuance of a Writ of Certiorari as requested by Petitioners.

Respectfully submitted,

THOMAS RUSSELL CLARK
MESCH, CLARK & ROTHSCHILD, P.C.
259 North Meyer Avenue
Tucson, Arizona 85701-1090
(602) 624-8886

*Attorney of Record for Respondents Raffety and Morris*

## APPENDIX

TABLE OF CONTENTS

Findings and clarification of trial court, November 20, 1986 ..... 1a

SUPERIOR COURT OF ARIZONA
COUNTY OF COCHISE

| | | |
|---|---|---|
| BILL ROSS CREAMER, | ) | |
| | ) | No. 39687 |
| Plaintiff/Appellant, | ) | |
| | ) | MINUTE ENTRY |
| vs. | ) | ACTION |
| | ) | |
| MICHAEL S. RAFFETY, et al., | ) | |
| | ) | |
| Defendants/Appellees. | ) | |
| | ) | |
| | ) | |

PRESENT: ----------

As directed by the Order of the Court of Appeals, dated October 20, 1986, this Court enters the following findings in clarification of the award of attorneys fees and costs:

A thorough review of the billing sheets presented by counsel for Plaintiff indicated to the Court that an unusual amount of time had been expended by counsel in "research" efforts. It would seem to this Court that any attorney seeking to be paid $150.00 per hour for his services would already be sufficiently experienced and knowledgeable in the kind of case at issue that so many hours of preparatory research would not be required. Interestingly, counsel has asked to be reimbursed for time spent travelling to and from, and attending a "Police Misconduct" seminar held in Tucson on February 23, 1982 (3.50 hours for travel, and 7.50 hours for attendance.)

With these concerns in mind, the Court considered very carefully the evidence presented at the evidentiary hearings of December 9, 1985, and December 24, 1985, and the subsequently presented deposition of John W. McDonald. Most pursuasive to this Court was the evidence by Mr. McDonald and Robert E. Lundquist. Each attorney testified on the basis of their civil litigation experience. Mr. Lundquist particularly impressed the Court with his experience and familiarity with "1983 actions." It was the opinion of both attorneys, after a review of this entire case, that the amount of time spent by Plaintiff's counsel was unreasonable and unnecessary. Mr. Lundquist testified that half, or more, of the time claimed by Plaintiff's counsel was unnecessary. Mr. McDonald expressed his opinion that reasonable attorneys fees should be between $7,500 and $10,000, while Mr. Lundquist said that $11,000 to $15,000 was reasonable.

On the basis of all evidence presented, the Court selected the highest opinion figure given, that of Mr. Lundquist of $15,000, as the appropriate amount of the award for attorneys fees. It is not possible to go through the Plaintiff's billing sheets and designate each time item that is reasonable and each one that is not. However, this Court has an abiding conviction that the total amount of time spent and claimed by counsel for the Plaintiff was not necessary or reasonable, and therefore that the losing parties ought not to be required to pay the amount demanded.

In reviewing the Judgment signed by this Court on March 17, 1986, there is a provision for an award of $15,000, for both attorneys fees and costs. This is an error, and not noticed by the Court when it was signed.

It was the Court's understanding that the opinions given by Mr. Lundquist and Mr. McDonald were as to reasonable fees only. This Court intended to enter an award of $15,000 for attorneys fees, as well as an award for all reasonable costs and expenses.

Date: *November 20, 1986.*

James L. Riley
/s/ Judge of the Superior Court